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The Jury System as a Leap of Faith

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Book Reviews

Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy.* New York: Basic Books, 1994. Pp. x + 308.

Stephen J. Adler, *The Jury: Trial and Error in the American Courtroom.* New York: Random House, 1994. Pp. xvi + 285.

Reviewed by Susan Bandes

There is an almost mystical quality to the belief in the jury system. Jeffrey Abramson and Stephen Adler confront serious limitations and contradictions in its workings, and despite those limitations each reaffirms his faith in the institution. Their recent books—both brimming with history, empirical data, legal analysis, and anecdote—might at first appear anything but mystical. Yet for all their efforts to trace origins, to quantify results, to understand, and to fix what is broken, neither book can really explain why we should agree to preserve the system despite its flaws. Belief in the jury system seems to require, ultimately, a leap of faith.

A leap of faith may be necessary, for example, to explain why Adler believes juries should go on deciding complex cases in specialized areas despite his convincing demonstration of their inability to do so in at least one complex antitrust case, or why Abramson believes juries should be entrusted with criminal cases that could lead to long prison sentences, despite his convincing argument that they should not decide capital cases.

We are all, these days, experts on the unpredictability of juries. We've witnessed the Rodney King verdict, the Menendez hung jury, Marion Barry's acquittal, and, as I write this, the speedy acquittal of O. J. Simpson. Yet our faith in the system persists, even as our puzzlement and fascination increase. Adler's and Abramson's books cannot resolve the contradiction between this faith and the frequent unworthiness of its object. But their explorations are insightful and illuminating.

Despite some overlap in coverage, the books differ substantially in their approach and in their goals. Even on the issues that both authors discuss (such as the use of jury consultants, and the ability of juries to pass sentence in capital cases), their approaches, as well as their analyses, often diverge sharply. Despite these differences, comparison of the books—on the same topic, released in the same year—is unavoidable. Although each book has much to recommend it, Abramson's is by far the more satisfying.

Abramson aims high, and in nearly every respect he succeeds. His greatest achievement is writing a book which promises to be accessible to nonlawyers

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but is filled with new insights and information for more knowledgeable readers as well. Although some reviewers have called the book challenging, it is a challenge well worth undertaking. Adler's book is much less demanding. For the lawyer or legal academic familiar with the field, it too frequently oversimplifies complex issues. Even for the nonlegal reader, it may seem thin in comparison to Abramson's rich and nuanced study.

Abramson's theme is nothing less than the jury's role in a democracy. He sees this role as conforming to two possible models. The representational model, which he finds disturbingly ascendant, holds that juries perform their democratic function by representing the various constituencies whose claims they must adjudicate. That is, not only are juries made up of people of diverse backgrounds, but each juror will hold fast to the perspective of the group she represents. Democracy is achieved by ensuring that the various perspectives are represented, and counterbalance one another. The deliberative model, which he champions, holds that although each juror brings her particular outlook to the jury room, the verdict will be reached through a process of open-minded debate and persuasion which will transcend initial partialities.

He then examines three major aspects of the jury's role: the type of knowledge it is expected to possess, the meaning of the notion of representativeness in the makeup of the jury, and the nature of deliberation on a verdict. He argues that, as to each aspect, the deliberative ideal has been eclipsed by the undesirable representational model.

Particularly after the debacle of searching for jurors who knew nothing about O. J. Simpson, Oliver North (Abramson, page 49), or Imelda Marcos (Adler, 48), Abramson's treatment of the first topic—jurors' knowledge—is not merely timely, but scathing. Abramson uses a rich variety of historical sources to demonstrate that the current search for jurors unaware of the most highly visible persons and events of the day is not firmly grounded in history. As he shows, the battle over the appropriate scope of jurors' knowledge had implications for the question of vicinage (the area from which jurors may be drawn); the question whether jurors should be law-finders as well as fact-finders; and the question of how impartiality ought to be defined.

It is well known that in colonial times juries were locally based and self-informing: they based their decisions, in part, on their personal knowledge of the events and people in question. In Abramson's nuanced version, we learn that even in colonial times the local character of juries was a conscious rejection of the Federalist position, which opposed local juries and favored jurors unacquainted with the persons or incidents of the trial (Abramson, 25–26). We further learn that, well into the nineteenth century, jurors with knowledge of the persons and incidents were acceptable unless there was reason to think they had prejudged the merits of the controversy. The current practice of demanding ignorance, which Abramson says "naively defines an impartial mind as an empty mind," is of relatively recent vintage. Abramson concludes that the ban on local knowledge "stands history on its head—disqualifying jurors for having precisely the acquaintances or information that once qualified them to judge their community's events in context" (37).

Abramson's indictment of enforced ignorance is so powerful in part be-

cause he appreciates the complexity of the issues. Although his own position on ignorant jurors is forcefully stated, he supplies the material for those who would debate him. He explains that the original preference for local juries with firsthand knowledge was not based primarily on the superior fact-finding abilities of such juries. Rather, it was based on an anti-Federalist belief in local people representing local values (29). Such familiar cases as the trials of John Peter Zenger and William Penn illustrate the democratic underpinnings of this belief—that the local jury can act as a bulwark again the imposition of repugnant or arbitrarily imposed foreign values.

Even in colonial times, there was an inherent irony in this democratic notion, for jury service was available only to white male property owners, and indeed only to a small percentage of them (29).[1] Abramson concedes that the anti-Federalists did not appear to object to prevailing restrictions on jury service. More relevant to current concerns, however, is the fact that it has become infinitely more complicated to speak of local values, local concerns, or local justice. Even to the extent that one can speak of localities' possessing homogeneous values, the modern ideals of uniform national rights and equal protection pose a challenge to the legitimacy of local justice. The vision of John Peter Zenger is counterpoised against the vision of an all-white jury in the Simi Valley vindicating the values of the white middle-class law enforcement officials who reside there in large numbers.

Abramson is well aware of the tensions, as is evident in his discussion of jury nullification. He begins by documenting the jury's loss of the power to decide questions of law. He recognizes that the law-deciding power raised the risk of uncertainty, local prejudice, and parochialism. Yet he notes that juries' exercise of the law-deciding power furthered democratic participation in a number of positive ways. Such juries shielded liberty against tyranny, brought enforcement into harmony with local values, and expressed the conscience of their community (87).

Abramson seems to concede that many of the conditions which made the law-deciding power possible no longer exist. First, the law is no longer "transparent." The law itself has become more complex; in addition, we no longer believe that law springs from natural reason and thus is accessible to all people. Second (and also connected to the move from natural law), communities even by the nineteenth century had become more heterogeneous, and less likely to share moral values which could be confidently translated into legal judgments.

Nevertheless, Abramson staunchly defends the power of jury nullification and argues for extending the power by informing jurors that it exists. He emphasizes that, unlike the general law-deciding power, the power of nullification cannot result in an unjust conviction in a criminal case. Even so, as he recognizes, it can work substantial injustice, as in the longstanding refusal of all-white Southern juries to convict whites accused of murdering blacks or civil

1. See also Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 877–82 (1994).

rights workers of any race (60), and in the acquittal in state court of the police officers who beat Rodney King. In short, prejudice, parochialism, and uncertain application of the law are real dangers of nullification. Abramson accuses opponents of nullification of "collapsed faith in the virtue of jurors" (93). Here is an example of the author's own leap of faith, and his request that we take the leap with him.

Abramson's discussion of jury selection and the cross-sectional ideal is among the most fully developed sections in the book. In this section, which is crucial to his argument, Abramson illustrates quite effectively the tension between the representational and deliberative models. He describes the deliberative ideal as "to draw jurors together in a conversation that, although animated by different perspectives, still [strives] to practice a justice common to all perspectives" (127). He describes the representational model as a cynic's view of juries, "in which there was not one justice for juries to represent but multiple justices reducible to whom a juror happened to be by race, sex, national origin, religion, occupation, income, educational level, and on and on" (124). His view is not simplistic; he recognizes that each juror's perspective will be informed by her particular situation, and that jurors are not "pure pieces of disembodied reason" (141). He argues quite reasonably that, even so, jurors ought to be able to learn from one another and from the evidence.

Nevertheless in some respects he does oversimplify. He seems to disdain the importance of the appearance of justice. He rejects the idea that a jury representing a cross-section of the community may be *appropriately* reassuring to the community itself, by assuring it that it has not been disenfranchised. Concern for the appearance of justice need not make the cross-sectional ideal nakedly political, as he seems to suggest.

The most difficult of Abramson's positions to reconcile is set forth in his last chapter, "Race and the Death Penalty." Here is a situation in which, as he notes, the jury is still permitted to operate as the conscience of the community. At least in theory, the jury may always show mercy and refuse to sentence the defendant to death, regardless of the nature of the crime or the aggravating factors.[2] Abramson provides a powerful discussion of the Baldus studies, which demonstrated that the race of the defendant, and especially the race of the victim, are significant factors in whether the jury will impose the death penalty.[3] He observes, correctly, that the jury's failure to act in a colorblind manner is unsurprising, given larger social failures at colorblindness. He recommends that capital sentencing decisions be taken from juries and given to judges (239).

I found this conclusion jarring in light of the rest of the book. As Abramson surely recognizes, racial prejudice is unlikely to infect only capital sentencing deliberations. It will likely affect deliberations in the civil rights cases for which he supports the power of jury nullification. It will likely affect deliberations in all criminal cases, including those in which the defendant can be sentenced to

2. Zant v. Stephens, 462 U.S. 862, 871 (1983).

3. E.g., David C. Baldus et al., Equal Justice and the Death Penalty (Boston, 1989).

life imprisonment. Although the argument can be made that death is different, and that the risks are simply not worth taking when the decision is irrevocable, Abramson's conclusion nevertheless seems to call into doubt his unquestioning faith in the virtue of jurors. We are back to the leap of faith. Just as it cannot be explained, neither can its limitations.

My reservations about Abramson's treatment of various issues did not detract from my admiration and enjoyment of his book. The book is provocative, and it is also generous. Abramson is not content merely to argue his case. He wants to enlighten us, even at the risk of exposing the inevitable loose ends in his own thesis. I was consistently educated, engaged, and challenged.

Stephen Adler's book confronts the dissonance between the idealized jury we hope for and the flawed juries (and jury proceedings) with which we live. The book is divided into three parts: "The Vision," "The Disappointment," and "The Hope." These sections set out, respectively, a description of a jury functioning properly, a series of descriptions of cases—some high profile, some not—in which the jury system failed, and a list of suggested means of reforming the jury system.

Most of Part I tells a detailed story about the trial and sentencing hearing of a young man, Mark Robertson, who had been charged with the capital crime of double murder. This section illustrates many of the strengths and weaknesses of the book.

Ever since the U.S. attorney censured the University of Chicago Jury Project for nonconsensual eavesdropping on jury deliberations (Abramson, 196), there has been the problem of access. Adler's method of repeatedly interviewing jurors and piecing together their responses and trial testimony into a narrative works very well. It succeeds in producing a series of detailed, very readable stories about what occurred in the jury room. In each case the access to jury deliberations was illuminating—a concrete and accessible means of illustrating the author's concerns about the jury.

In the Mark Robertson case, we are permitted to listen in on deliberations during both the guilt phase and the sentencing phase of a capital trial. Adler chose the trial to illustrate a case in which the system worked, and it serves this purpose admirably. The jury understands its different roles in the two phases, and in each phase is deliberative in the best sense. All the jurors well appreciate the enormity of the decision they are called upon to make. Each juror thoughtfully sifts through the evidence and considers the opinions of the other jurors. The verdicts seem well supported by the evidence. Moreover, the jury arrives at the death sentence after due consideration of the quality of mercy, although it ultimately decides that mercy is not appropriate in the particular case.

Nonetheless, the vignette is unsatisfying in a couple of respects. One small respect, which I mention because it recurs throughout the book, is its tendency to oversimplify the law in ways which border on misstatement. Adler mentions, with seeming approval, that the practice of "death qualifying juries steers a middle ground by letting juries reflect their communities' diverse viewpoints on capital punishment without standing in the way of all executions" (11).

I searched in vain for even an endnote mentioning that death-qualified juries tend to be more likely to convict at the guilt phase,[4] or that the *Witherspoon*[5] decision was in any way controversial. Likewise, although the jurors focus during the sentencing phase on their fears that the defendant will be released and cause more harm (35), Adler never mentions the legal debate that culminated in *Simmons v. South Carolina*.[6] *Simmons* held that where the prosecutor has argued that the defendant's dangerousness should lead to his execution, the defendant is entitled to an instruction that another possible sentence is life imprisonment without eligibility for parole.

Adler has obviously attempted to pitch his book to a lay audience, which makes it a sometimes frustrating read for lawyers. But as the Abramson book illustrates, it is possible to succeed with both legal and lay audiences by apprising them of the complexity and contradiction inherent in an issue, rather than merely stating the bottom-line conclusion.

The larger respect in which the description of the Robertson trial is unsatisfying is in its failure to deal with the issue of race. Adler devotes two sentences to the issue, noting that opponents of capital punishment argue that the system is racially biased, and that these opponents are calling for abolition of the death penalty, not replacement of juries with judges. (Ironically, replacing juries with judges in capital sentencing proceedings is exactly what Abramson does favor.) Here, as with many of the issues both books discuss (compare the discussions on scientific jury selection and peremptory challenges), Adler's book suffers by comparison.

In the wake of the Simpson verdict, if not before it, it seems impossible not to discuss race. In describing the smooth functioning of the Robertson jury, Adler never discloses the race of jurors, victims, or defendant. Perhaps he believes that race ought to be irrelevant to his point, but in light of the Baldus studies it is difficult to glean larger lessons from the vignette without giving some thought to whether racial variables affected the dynamics he describes.

Part II of Adler's book is tremendously enjoyable. It tells five stories of jury deliberations in a variety of cases: the high-profile Imelda Marcos case, a complex antitrust case, a personal injury case, a murder case, and a case in which principles of scientific jury selection were used. I found the description of the antitrust case, a suit by Liggett & Myers against Brown & Williamson for anticompetitive practices in the cigarette industry, to be especially effective. Here was a jury operating in good faith and undergoing personal hardship (the trial took eight months), but given none of the tools it needed to understand the difficult concepts that would enable it to pass judgment. This chapter is Adler's most effective argument for his subsequent proposals for reform.

4. Lockhart v. McCree, 476 U.S. 162, 193–203 (1986) (Marshall, J., dissenting).

5. Witherspoon v. Illinois, 391 U.S. 510 (1968); Susan Bandes, Taking Some Rights Too Seriously: The State's Right to a Fair Trial, 60 S. Cal. L. Rev. 1019, 1026–31 (1987).

6. 114 S. Ct. 2187 (1994). The Supreme Court decision in *Simmons* itself may have come down after the book went to press, but the issue was hotly debated in the lower courts.

The proposals themselves, set forth in Part III, are sensible, pragmatic, mostly unobjectionable, and something of a letdown. The proposals to pay more attention to the dignity and comfort of the jurors are laudable—and remind us how rarely the well-being of the jurors is the focus when we discuss reform. The proposals to present jury instructions early and in understandable language and to allow juror note-taking are eminently sensible. Yet given the success of the book's major section in convincing us that there are serious problems with the jury system, these reforms look like tinkering at the margins. Adler's more powerful suggestion is to reform the composition of juries, by eliminating peremptory challenges and most exemptions. His arguments for these two reforms are well supported, and he makes a convincing case that they could improve the quality of justice considerably.

Ultimately, the disappointment Adler describes stays with us as the hope fades. Like Abramson, he cannot explain his ongoing faith in the jury system. However the reader comes out on this question, the immediacy and freshness of Adler's vignettes, and the richness of Abramson's historical analysis, enable us to think about our own vision of the jury in a new light.

Gregory Howard Williams, *Life on the Color Line: The True Story of a White Boy Who Discovered He Was Black.* New York: Dutton, 1995. Pp. xiv + 285.

Reviewed by Martha Chamallas and Peter M. Shane

In 1954, at the age of ten, Greg Williams took an unforgettable journey to Muncie, Indiana. Until that time, Greg and his younger brother Mike had lived in Virginia as white children. Their mother was white, and their father (then called Tony, later Buster) told everyone that he was Italian. But when the marriage broke up and Tony's financial ventures failed, he pushed Greg's life over the color line. He moved the boys to the black section of Muncie, where he had been raised. "In Virginia you were white boys," he told Greg and Mike. "In Indiana you're going to be colored boys" (page 33).

Life on the Color Line is Greg Williams's compelling memoir of his childhood and adolescence. On one level, the story is an intensely personal account of a young boy's discovery of himself and of a son's coming to terms with his father. At another level, the book is a slice of American social history during the '50s and '60s, a documentary of the cruelties inflicted by racial hierarchy. Most profoundly, the memoir is a meditation on the social construction of identity, exploring the complexity of the meaning of race and racial identity.

Gregory Howard Williams, now the dean of the Ohio State University College of Law, was our colleague on the University of Iowa law faculty for twelve years. One of the first observations white people often make about Greg is that although he looks white, he is "really" black. It now seems startling to us that, over the years, we never understood how revealing that description was of Greg's identity. At Iowa, Greg's blackness was shown by his actions, interests, and affiliations. When he was director of admissions, he recruited record numbers of African-American students to law school and worked hard to find financial support for them; as an associate vice president, he exerted behind-the-scenes pressure to encourage departments to diversify their faculties; and as a classroom teacher, he taught about race and the criminal justice system. But occasionally someone who did not know Greg or who was unaware of his work would be astonished to learn that he was black and would question what it meant to "be" black and yet look like Greg Williams. *Life on the Color Line* responds to that central question of identity.

A tension this memoir cannot help but pose is whether we are reading about the author's past or about our collective present. There were no labels in 1950s America for much of what is described through Greg's young eyes. "Domestic violence," "child sexual abuse," "codependency," and "sexual ha-

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rassment" are all post-1970 terminology for phenomena clearly present before they were named, but necessarily understood differently. Greg Williams paints such cruelties vividly. In the process, he shows the intricate connections between racism, poverty, and these other forms of abuse.

In this review, we concentrate on two dimensions of Greg Williams's life story: his documentation of the cruelty of racism and his discovery of racial identity. His father looms large in both these stories. It is an unsparing portrait, but one offered in the spirit of forgiveness. The intertwined stories of racism and identity help to explain why.

Race and Rejection

For the first ten years of his life, Greg (who was then called Billy) lived in Virginia with his parents, his brother Mike, and a younger brother and sister. Neither parent ever told the children about their background. Life was not easy for Greg: his father drank heavily and brutalized his mother. Tony's financial fortunes rose and fell as quickly as his moods. One year he made over $50,000, had an exclusive townhouse in Alexandria, and drove a Cadillac; the next year he was penniless and totally incapable of providing for his children.

The major trauma of Greg's childhood occurred when his mother abandoned him and Mike, taking the younger children with her as she fled from Tony. Greg and Mike were virtually left to fend for themselves. Shortly before they left for Muncie, their situation was desperate: their clothes were tattered and dirty, they were hungry all the time, and they were devastated by their inability to understand why such terrible things were happening to them. In poignant, graphic detail, Greg recounts how the brothers coped with their fear and emotional deprivation:

> When school started in September, my hand shook with doubt as I pencilled her name over "Mother" on my enrollment form. Reaching into my book bag, I grabbed an ink pen, and I traced over "Mary Williams" so she couldn't sneak into the school at night and erase her name. Homework kept me occupied, but Mike lost interest in school. Every evening he sat perched on the tavern steps like a motherless bird, eyes darting up and down Route 1, hoping Mom would arrive in the next car drifting into our parking lot (25).

Even before Greg crossed the color line, the pain of rejection was a central force in his life.

Greg began his life as a black boy when Tony decided to leave the boys with his mother in Muncie. Perhaps the most dramatic part of the book is Greg's description of his transition to Muncie, a violent transition in which he and Mike were forced to cope with intense poverty, neglect, and bewilderment over their place in the world. Everything was different: Tony was now called Buster, and the tall, thin, brown-skinned woman whom Greg had known in Virginia as simply one of the hired help was revealed to be his grandmother, Sallie. The squalor surrounding the lives of Greg's relatives was shocking to the young boy. At first Greg thought Sallie's house was a tool shed. He was revolted by the smell of the outhouse, scared by the nasty rooster patrolling the yard, and even more afraid of the drunk and boisterous folks that hung out every night at Sallie's house.

Muncie reinforced the pain of rejection in the boys' lives. Their white relatives in town refused to acknowledge them. Even though it was obvious that Sallie's house was unsafe for the boys, none of Greg's relatives from his mother's side offered any help. Instead, the boys' lives were literally saved by a stranger—Miss Dora—a neighbor who took the boys into her home and paid for everything out of the $25 she earned weekly as a maid. The love and gratitude Greg felt for Miss Dora is evident throughout the book. He touchingly refers to her as his "truly mother" and is enraged because white people cannot seem to comprehend why a woman who was not a blood relation would ever choose to care for needy children.

Unlike much else in Muncie at the time, the public schools were racially integrated; race-based rejection was not written into Indiana education law as blatantly as in the Southern states. But race discrimination was efficiently managed by powerful informal mechanisms. For example, there was an unwritten rule at Greg's school that the sixth-grade academic achievement award was reserved for white children. In an especially painful passage, Greg recounts the assembly in which he learned that he had been robbed of the honor he had earned as the top student in the class (125–26).

The sting of being passed over unfairly is what many people probably identify as the crux of invidious discrimination. But much of the power of this memoir lies in the different message Greg Williams conveys about the experience of discrimination. Though the line is a fine one to draw, the anger and shame that discrimination engenders, in Greg's experience, seem not to stem principally from an internalized sense of frustration or blatant unfairness. It is the experience of discrimination as *rejection,* a motif in Greg's life from the moment his mother abandoned him, that is the source of the pain of racism.

Some of the rejection Greg endured followed the familiar script of white supremacy before the civil rights movement. Greg recounts how two little white girls who had initially befriended him in school turned away in disgust when they discovered he was black. His white appearance was often more problematic than liberating. Greg soon learned that his "very existence made people uncomfortable and shattered too many racial taboos" (166). He recalls watching a Ku Klux Klan leader on TV shortly after *Brown v. Board of Education* was decided:

> [H]is nasal repetition of "mongrel mulatto" finally hit me like a thunderbolt. He was talking about me. I was the Klan's worst nightmare. I was what the violence directed against integration was all about. I was what they hated and wanted to destroy. And that was the biggest puzzle in the world to me because I had absolutely nothing (91).

Some of the rejection Greg endured was of a sort not well documented in the familiar cultural scripts, perhaps because it involves relations among black children. The playgrounds in Muncie were racially segregated but, even so, there was no peace for Greg and his brother. Some of the black kids would taunt them because they looked white, and Greg often found himself getting into fights and screaming, "I ain't white" (119).

Buster had warned Greg that his relations with other black people would be difficult. On their trip to Muncie, Buster told his son that Greg would have

to be very careful in his new life because neither whites nor blacks liked "half-breeds" (38). That proved to be not quite true. Although many blacks were willing to accept Greg only gradually, and only after he proved his allegiance to the black community, whites were far more threatened by Greg and his "deceptive" appearance. Indeed, the harassment he experienced from some blacks was different from the hostility of white teachers and classmates and had a different origin. As Greg describes it, the anger blacks felt toward whites was a response to hurt:

> Though I continued to endure barbed teasing about my white relatives, I began to take some solace in the belief that there were many more members of the black community who wanted to ignore white relatives than one might imagine. Denial of their full heritage was due less to anger and prejudice toward their white families than the total and absolute rejection of their existence by them (123).

In junior high, the color line intensified as the powers-that-be exerted pressure to prevent black boys from dating white girls. The only "guidance" Greg ever received from his school counselor was to stay away from a white girl who had been pursuing him. The cruel irony was that when Greg chose to date a dark-skinned girl, they both were met with jeers of "nigger lover." The combination of racial and sexual taboos in Muncie made dating for Greg "like swimming in shark-infested waters" (166). His brother Mike, however, followed their father's example and recklessly pursued both black and white girls, undeterred by the many stories he and Greg heard about false claims of interracial rape. In contrast, Greg became cautious about girls, repeatedly vowing to devote all his energy to school and athletics.

The racial battlegrounds at school and on the playground did not pose the biggest problem for Greg. The greatest challenge of his adolescent life was how to handle his father, whose drinking and abuse had by this time gotten totally out of control. A subplot of *Life on the Color Line* is the struggle of Greg, as the responsible son, to protect his father from himself. Next to Greg, Buster Williams is the most highly developed character in the memoir. He is simultaneously the worst and the best parent. Unlike Greg's mother, Buster never totally abandoned the children. He was a dreamer and a schemer who had high hopes and expectations for Greg and gave him faith in his own ability. But Buster also hurt Greg. He could be incredibly cruel and conniving. He exacted "commissions" from his sons for the jobs he found for them, while his own drinking prevented him from keeping any job for long. He was ready, particularly when drunk, to berate his sons and play on their vulnerabilities. Greg recounts one incident after he literally carried his drunk father home on his "big shoulders," only to be told by Buster that what Greg needed was "some pussy to clear up those pimples" (175–76).

Greg's portrayal of his father makes clear that he sees the source of his father's cruelty in the rejection and pain that Buster also suffered. Buster's own father, a wealthy white man, never had anything to do with him. Buster's mother had worked for his father as a maid; he fired her when she became pregnant. Both blacks and whites taunted her "white nigger" baby and de-

manded she leave town. When Buster was an adult, he went in search of his father and tried to confront him. He found he could not even bring himself to face his father and say, "I am your son."

Greg's account of his travails with his father will resonate with readers who have been abused or neglected by their parents or who have suffered because of a parent's illness. This theme in the memoir is universal and speaks eloquently to the pain of children who are forced prematurely to nurture their parents. But what is most compelling about Greg's portrayal of his father is the way he traces the impact of racial oppression on the development of his father's character. Buster Williams was highly intelligent, one of Muncie's first blacks to go to Howard University. He was a talented writer whose skills were used by the local white politicians to draft campaign leaflets and speeches. But when it came time for distributing patronage, Buster's only reward from City Hall was a janitor's job. Buster finally left Muncie when he was roughed up by police, arrested on suspicion of burglary, and jailed for seven days. Buster's political connections counted for nothing; as a black man, he could always be put in his place. Even for a dreamer and hopeless optimist, it was hard not to give in and give up.

The pain in Buster's life made itself manifest in many ways in the lives of his sons. Perhaps most cruelly, he could not bring himself to offer any hope or encouragement to Mike. In a wrenching episode, Buster makes his sons fight for bets in a ribs joint: "Boys, now square off! We're gonna see who is the best man. The nigger or the white boy" (154). His description of his sons was telling; he basically wrote off his academically less talented son as doomed to a life of hustling. He told Greg that Mike's "gonna be a no-'count black bastard just like me" (156).

The anguished longing that undergirds the pain of rejection does not disappear over time. Like Patricia J. Williams in her autobiographical essay,[1] Greg Williams describes how it is possible to detest the white part of your heritage because it represents rejection and dispossession, and yet continue to long for recognition from all your blood relatives. Greg's decision to live his life as a black man never erased the longing for his mother or his desire to have her realize the enormity of what he had to live through. His memoir documents, in excruciating clarity, the cruelty of racism and its cost to the human spirit.

Love and Identity

The complexities of race also form the primary backdrop for Greg Williams's search for identity. With this theme, *Life on the Color Line* could hardly be more timely. Lately biracialism and the meaning of race itself have been in the forefront of public discourse, from the debate about the categories used in the U.S. census to the controversies over affirmative action and mixed-race adoptions. The memoir contributes much to this discussion. Perhaps because the

1. On Being the Object of Property, *in* The Alchemy of Race and Rights: Diary of a Law Professor 216 (Cambridge, Mass., 1991).

book does more than simply present an argument—because it represents a life work as well as an extraordinary life—it is full of insights with theoretical significance.

We began to appreciate the subtleties of Greg Williams's account of racial identity when we considered the puzzle posed by his subtitle: *The True Story of a White Boy Who Discovered He Was Black.* How could Greg have been a "white boy" and then, later, a "black boy"? Was he both "white" and "black" all along? The move to Muncie changed nothing about either Greg's genes or his genealogy. Could Greg have discovered he was a "black boy" without moving to Muncie?

These dilemmas are most puzzling if we insist on thinking of race and racial identity as immutable characteristics. Of course, Greg's story is unusual because few people change their understanding of their own and their families' identity as radically and as rapidly as Greg did on that fateful trip to Muncie. But *Life on the Color Line* does reveal a more universal insight: namely, that it is a constellation of circumstances, of which skin tone is but one, that creates the potential for racial identity. Within the potential range of identities, a single person can experience racial identity in plural form; in some forms, racial identity is something people choose—and choose deliberately—at a number of points in their lives.

Greg initially acquired the potential for a new racial identity through his father's disclosure of the truth about himself. Greg's new knowledge allowed him to see his father in a different light and to reposition himself in a changed world. His reaction demonstrates dramatically that race is not a fixed trait apart from people's perceptions:

> I saw my father as I never had seen him before. The veil dropped from his face and features. Before my eyes he was transformed from a swarthy Italian to his true self—a high-yellow mulatto. My father was a Negro! We were colored! After ten years in Virginia on the white side of the color line, I knew what that meant (34).

But Greg's potential for a black identity also depended on his experience with black people and on his pursuit of this new knowledge. His father's disclosures inspired Greg to look more closely at black children and develop a more complex understanding of color, to break down the dichotomous view of black and white into a spectrum or continuum of difference. On the playground of "black" children there was suddenly "every imaginable hue of brown, ranging from deep chocolate to the color of the speckled light brown eggs we found in Aunt Bess's henhouse. And now two palefaces—Mike and me" (51).

It is critical to Greg's account that his "discovery" that he was black did not occur in the single moment he learned of the fact of his father's biracial background. He repositioned himself as a black person only gradually, and he was influenced by forces far deeper than the recognition that he had many "honey, brown, and chocolate" relatives. A clear message from *Life on the Color Line* is that, as experienced by the individual, racial identity is relational and emotional, dependent on personal experience and practical human need. We

have no doubt after reading this memoir that Greg Williams identifies himself as a black man, rather than as a white man or biracial man.

Greg "became" black, however, because of two important factors. First, at key points in his life crucial black people embraced him and gave him a sense of belonging while, for the most part, white people rejected him. Buster, for all his shortcomings, was probably the most important strength in Greg's early life. Emotionally, Miss Dora, not Mary Williams, was Greg's mother. The rejection by his mother and her relatives not only produced anger and pain; it altered Greg's sense of himself. Even for a ten-year-old child, the sense of self was dependent on reinforcement from his family and from those who loved him.

Second, the more Greg came to understand the situation of American blacks, the more their history—a history of rejection, perseverance, and achievement—came to provide a narrative within which he could make sense of his life. Among the most revealing passages in the book is Greg's internal response to his father after Buster suggests that when Greg leaves Muncie, he too can pass for white:

> I hadn't wanted to be colored, but too much had happened to me in Muncie to be a part of the white world that had rejected me so completely. I believed that most of Dad's problems stemmed from his attempt to "pass for white" in Virginia. . . . If Walter White could choose to remain in the black community and make a difference, so could I. . . . I knew who I was and what I wanted to be (157).

This is not to suggest that, in all aspects, the acquisition of racial identity is a matter of choice. An obvious question is why Greg had to be rigidly classified by so many people in his life as either white or black, given that he had one white parent and one biracial parent. The answer from the memoir is plain: there was little space for biracialism in segregated Muncie in the 1950s and early 1960s. In the public realm, personal choice about racial identity had little room to operate. As a youngster, Greg was offered choices so constrained as not to be meaningful.

Although Greg's pale skin made it possible for others sometimes to think of him as white, the ideology of white supremacy in Muncie made it practically impossible for him to "be" white and survive. Whites would not tolerate anyone known to have black relatives, as Greg painfully discovered when his two little white friends in elementary school abandoned him. Moreover, the policing of the color line made it inevitable that people would find out about him. The teachers from the elementary school made sure that the staff at the junior high school were not fooled by Greg's appearance. On Greg's confidential high school record, there was a notation that his father was "colored," even though "from outward appearance" Greg looked white (257).

It took considerable human effort to maintain the color line, and ambiguous situations were carefully managed to make them seem unambiguous. By the time Greg was in high school, he had already had considerable experience negotiating the dilemma of looking white and being black. When he had to select where to sit in the auditorium, with whites on one side and blacks on the

other, he joined the black students, realizing that he "had no real decision to make" (191). One of his black classmates astutely analyzed Greg's decision to sit with the black students as making his life "less complicated" because, sooner or later, the white students would find out about him and reject him. Choosing to sit with the black students assured that Greg would not find himself an outcast with no group willing to associate with him.

Consistent with his treatment of racial identity, the view of family that Greg Williams paints in *Life on the Color Line* emphasizes nurture over nature. Greg acknowledges an inexpressible debt to Miss Dora, who truly became his mother. Likewise, Buster did not fail as a father, because at critical times in Greg's life he showed faith and pride in his son. The emphasis here is on actions, lived-out relationships, and displays of love and a sense of belonging, rather than biology or genetics.[2]

Finally, Greg Williams does not stake the case for the authenticity of his blackness on the exclusion of whites from his life. We learn in the memoir that Sara, his true love in high school and now his wife, is a white woman. And now that their two biological children are grown, Greg and Sara have adopted two boys from Honduras. What Greg's life seems to say, as eloquently as it can be said, is that identity depends on those who accept and love you and provide you with the strongest sense of yourself.

* * * * *

When he was in the tenth grade, Greg Williams came across the classic study *Middletown,* by Robert S. and Helen Merrell Lynd.[3] The Lynds had dissected Muncie in the 1920s as the typical American town. The town their study constructed, however, was racially and ethnically homogeneous. Indeed, in their quest for typicality the Lynds deliberately sought out a town with comparatively few blacks or foreign-born citizens and built their narrative around interviews of white people only. *Middletown* was a disappointment for Greg because it revealed nothing about the lives of black people—even though blacks already constituted six percent of the population when the Lynds did their research, and the Ku Klux Klan was a powerful force in the town.

The Muncie we see in *Life on the Color Line* is remarkably different from the Lynds'. Greg Williams has constructed a Muncie in which racial difference is at the center of the narrative—a complex town that is both segregated and integrated, where the color line must constantly be policed because it might otherwise be seen as blurry, deceptive, and shifting. Embedded within Greg Williams's memoir is a rich contemporary version of *Middletown* which grapples

2. The memoir reinforces Dorothy Roberts's observation that, for many blacks, genetic ties seem less important to the creation of personal identity than for whites, who sometimes use genetics as a way of strengthening racial borders and excluding outsiders. In the black community, genetic ties are recognized without, however, "giving them the power to devalue and exclude other types of relationships." The Genetic Tie, 62 U. Chi. L. Rev. 209, 211 (1995).

3. Middletown: A Study in Contemporary American Culture (New York, 1929).

with the themes of race, identity, family, poverty, and human motivation and desire.

In *Life on the Color Line,* Greg Williams tells his life story with humor, without hate, and with the understanding of someone who has experienced the world from different positions and perspectives. The universal quality of the memoir is its demonstration that a little boy can be hurt by a society fixated on maintaining racial categories and hierarchy, yet still have the spirit to emerge whole. Greg Williams shows us the dark side of Middletown but, in the process, gives us hope.

Frederick Mark Gedicks, *The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence.* Durham: Duke University Press, 1995. Pp. x + 196.

Reviewed by George W. Dent, Jr.

The Supreme Court's religion clause jurisprudence is so chaotic that criticizing it is shooting fish in a barrel. In *The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence,* Frederick Mark Gedicks, professor of law at Brigham Young University, explores the genesis of this confusion. He ascribes it to "the displacement of a religiously informed communitarian discourse on public morality and politics by a secular, neutral, individualist discourse on such matters" (page 4). Secular individualism "considers religion to be an irrational and regressive antisocial force that must be strictly confined to private life in order to avoid social division, violence, and anarchy" (12). This "privatization" thesis has been advanced before—Gedicks is one of its pioneers—but *The Rhetoric of Church and State* gives it its deepest development to date and thus presents an opportunity to evaluate the thesis.

Gedicks says religious communitarianism "incorporates . . . interdenominational conservative religious beliefs and practices" and holds that "government may act to encourage religious traditions that nurture and reinforce conservative cultural values" (11). In the 1960s a secular individualist majority on the Supreme Court repudiated religious communitarianism and embraced Jefferson's metaphor of separation of church and state as its talisman. The metaphor alone does not explain the Court's behavior, however: "While the majority of Americans support the general principle of separation of church and state, most strongly disagree with the strictness and vigor with which the Supreme Court has located and policed the boundary" (3).

As Gedicks says, the Court's new attitude was not warranted by the intentions of the framers of the First and Fourteenth Amendments (14–21). The privatization theory, however, admirably explains why the Court carried separationism to such lengths. For example, to give students in private (including parochial) schools a fraction of the state aid afforded to students in government schools would not seem to the founders or to most Americans today to traduce separation of church and state. If one views religion as a strictly private matter, though, decisions forbidding such aid make sense.

Gedicks also discusses the confusion in religion clause jurisprudence since the '60s. In the Supreme Court religious communitarianism, "while unmistakably defeated, was not wholly vanquished" (4): secular individualists on the Court still must reconcile precedents based on different principles, win over

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ambivalent justices, and mollify a public that would reject some applications of secular individualism. Likewise, justices opposed to secular individualism are compelled by stare decisis and the search for concurring votes to adopt the rhetoric of secular individualism. As a result, the Court employs that rhetoric even in decisions that in substance conflict with the thesis. Thus the Court upholds aid to or celebration of religion by implausibly claiming that the aid has secular benefits (as with property tax exemptions for churches), that the recipient is not truly religious (as with religious colleges receiving state aid), or that the matter celebrated is not truly religious (as with Christmas displays). This reasoning generates inconsistency because secular benefits or purposes can always be found in government actions or in recipients of government aid if one stretches far enough.

Secular individualism professes religious neutrality. But it defines neutrality to mean not that government must neither promote nor hinder any one sect or religion generally in the competition among belief systems, but that religion is to be relegated to the private sphere and there left alone. Thus when faced with a law requiring that creationism be treated equally when evolution was taught in public schools, the Court opted for privatization over neutrality and held the law invalid.[1] Similarly, secular individualism opposes government aid to religion. In a minimal government, like the early American republic, the neutrality and no-aid principles could coexist; but, in a welfare state, aiding secular institutions (like public schools) and not aiding religious institutions (like parochial schools) is not neutral but disadvantageous to religion. Unwilling or unable to forbid all aid, though, the Court muddles along aimlessly from case to case.

Similarly, privatization accounts for the often anguished debate about whether the Supreme Court is hostile to religion. For those who view religion as strictly a private matter, the Court's secular individualism is neutral, even protective, toward religion. But secular individualism discriminates against, and therefore is considered hostile by, those who oppose this view and who believe that religion may enter the public square and share in the benefits of government—whether on a preferential basis, as religious communitarians hold, or on a neutral basis, as some others favor.

Secular individualism construes the Free Exercise Clause to exempt religionists from an ostensibly neutral law that imposes unusual burdens on them because of their faith unless an exemption from the law would defeat a compelling governmental interest; but it does not permit the clause to confer any secular advantage on religionists. This rationale is sometimes deployed to reach religious communitarian results by exaggerating the importance of the governmental interest or secular benefits of a religious exemption. Most notably, in *Employment Division v. Smith*[2] the Court virtually nullified the Free Exercise Clause by holding that it does not exempt religious believers from compliance with generally applicable laws regardless of how heavy the burden on their faith and how slight the governmental interest in denying the exemp-

1. Edwards v. Aguillard, 482 U.S. 578 (1987).

2. 494 U.S. 872 (1990).

tion. A religious communitarian would justify this decision by the power of government to support the majority's religious values. The Court, however, invoked secular individualist discourse by raising a specter that broad free exercise exemptions would provoke social strife.

Gedicks does not point out that secular individualists do not always apply their principles of free exercise consistently. For example, they often oppose free exercise exemptions from laws forbidding discrimination based on race, sex, and sexual orientation and exemptions of public school children from classes that offend their faith. Such exemptions seem consistent with secular individualism's professed support of individual choice in religion and of exemptions from burdens that confer no material secular advantage. Again, privatization could untangle the knot; secular individualism opposes religious exemptions only for private behavior, not for activity in the public schools or the public square.

Still, the secular individualists on the Supreme Court have favored a broader definition of free exercise than their opponents. Gedicks nonetheless seems to criticize them for rejecting free exercise exemptions that would confer secular advantages. Clearly there must be some limit on free exercise exemptions, though. It would be difficult to confirm the sincerity of someone who claims, for example, a religious objection to paying any taxes. Unlimited exemptions would also discriminate against and breed resentment among those not exempted. During the Vietnam conflict the statutory military draft exemption for conscientious objectors angered others even though objectors had to perform noncombat service. What strife would have occurred if the Supreme Court had construed free exercise to exempt objectors from all military service? It is fair to ask what limiting principle Gedicks proposes instead.

Gedicks does not challenge the premises underlying secular individualism. Secularists view religion as divisive and oppressive, but history's worst slaughter and oppression have been perpetrated by anti-religious regimes—Nazi Germany, the Soviet Union, and Communist China. Nor has the Supreme Court's secularism reduced religious strife. There is less conflict over public funding of education in countries like Holland that provide equal funds to parochial schools than in America, where only minimal aid is permitted. There is also less friction here over state funding of colleges, which extends to private (including religious) schools, than there is to state funding of elementary and secondary schools.

Gedicks also mistakenly accepts the claim that religion rests on faith while secular opinions stand on reason and empiricism (31). Values may be based on religious or secular beliefs, but reason alone cannot generate values. Indeed, although religion is often intolerant, many ideals of American democracy originated in the Protestant Enlightenment. Thus the Declaration of Independence proclaims that "all men are created equal, endowed by their Creator with certain unalienable rights." Secular discourse can also sustain individual freedom, but the history of the twentieth century shows that it often does not. The barbarity of many nonreligious regimes in the twentieth century may help to explain why secularism never captured the American public and

now seems to be ebbing even in its home on the political left. Examining these problems of secularism might also have helped Gedicks to admit rather than deny the possibility of a third discourse.

Though critical of secular individualism, Gedicks opposes a turn (or return) to religious communitarianism, which would provide "direct financial grants to majoritarian religious organizations [and] public school instruction by ministers and priests" (122) and "tolerate religious dissenters only to the extent that their practices do not threaten majoritarian religious values" (116). Gedicks considers some of these possibilities "frightening" (122) and "undesirable" (123). Thus: "Religious communitarian discourse is not a viable alternative to secular individualism." As for a third discourse that would be coherent and satisfying, Gedicks says: "I know of no such discourse and doubt that one yet exists." Indeed, the two discourses are "antithetical," so "efforts to mediate a compromise position between the two are doomed" (123).

Gedicks's critique of religious communitarianism is fragmentary—almost an afterthought—and problematic. Many critics of secular individualism do not advocate "direct financial grants to majoritarian religious organizations, public school instruction by priests and ministers, and repression of minority religions." Gedicks condemns the Supreme Court's virtual repeal of the Free Exercise Clause in *Employment Division v. Smith* but fails to mention that Congress then overwhelmingly passed the Religious Freedom Restoration Act,[3] which reinstated the compelling governmental interest test in free exercise cases. Most of those voting for the act were not secular individualists. Even if a coherent third discourse does not yet exist, clearly many—perhaps most—Americans do not fall into the only two camps that Gedicks recognizes. Gedicks's pessimism about compromise is warranted to the extent that no compromise will satisfy everyone, but I think that most Americans are willing, even eager, to find a compromise.

Still, Gedicks's critique of religious communitarianism is valuable. He cannot be dismissed as a secularist demonizing religious believers; he is religious, and his fears are sincere and have some basis. Justice Scalia, for one, does not construe the religion clauses to pose any obstacle to the kind of religious communitarianism that Gedicks dreads. Decisions like *Smith* (in which Justice Scalia wrote the majority opinion) fuel apprehension that his views will triumph in the Court. Other opponents of secular individualism must show people like Gedicks that they would not create his parade of horrors—that is, they must demonstrate the possibility of a third discourse. The founders' belief in religious freedom, which was rooted in their own religious beliefs, offers at least the basis for a third discourse. Some justices and scholars champion religious neutrality: government should neither promote nor hinder religion generally or any sect in particular. Authentic neutrality opposes both secular individualism, which Gedicks rightly says is not truly neutral toward religion, and religious communitarianism, which does not even claim to be. Although disagreement about details in the meaning

3. 42 U.S.C. §§ 2000bb to 2000bb–4 (Supp. V 1993).

of neutrality is inevitable, it seems as plausible an approach as the two Gedicks criticizes.

The Rhetoric of Church and State explains why the Supreme Court, while proclaiming the principle of separation of church and state endorsed by most Americans, nonetheless reaches results opposed by most Americans, and while proclaiming religious neutrality reaches results that are widely perceived as not neutral but hostile to religion. It also shows why the confusion in religion clause jurisprudence does not stem from simple sloppiness on the Court but from the nature of secular individualism and its status on the Court and in society. Finally, it challenges those who reject both secular individualism and Gedicks's nightmare of intolerant religious communitarianism to come forth with a plausible alternative. That is an impressive set of achievements.

Martin H. Redish, *The Constitution as Political Structure.* New York: Oxford University Press, 1995. Pp. viii + 229.

Reviewed by Louis Fisher

In this tightly written and stimulating book, Martin Redish takes issue with scholars who have urged the judiciary to withdraw from structural issues—federalism and separation of powers—and leave those disputes to accommodations fashioned by the political branches and the states. Having relinquished this area of responsibility, the courts would then concentrate on matters involving individual rights and liberties.

Redish does not believe that the courts can, or should, accept such a division of work. Instead of being able to distinguish between political structure and rights, with the first issue parceled out to the elected branches and the second to the judiciary, Redish sees a "vital symbiotic relationship" between political structure and issues of individual liberty. He argues that an attempt to draw a dichotomy, for purpose of judicial review, between issues of structure and rights "dangerously undermines the complex intersecting network of protections the Constitution gave us against the onset of tyranny" (page vii).

As Redish notes, it is ironic that contemporary scholars would associate judicial review with individual rights and liberties and encourage the courts to abandon review of issues involving federalism and separation of powers. The draft constitution agreed to at the Philadelphia convention was largely a structural framework designed, through a system of checks and balances, to protect individual liberties. Political power would be divided between the state and national governments, and divided again among the legislative, executive, and judicial branches. Preoccupation with specific rights did not come until the adoption of the Bill of Rights. From the standpoint of constitutional history and theory, any "purported dichotomy between constitutional structure and constitutional rights is a dangerous and false one" (4). Certainly the courts have a right to strike down any executive or legislative action that attempt to encroach upon the independence of the judiciary.

On this basic and fundamental point, Redish is surely on firm ground. In recent years, the Court itself has reaffirmed that it has fundamental responsibilities in monitoring federalism and separation of powers, and that it cannot leave those determinations solely to the play of political forces in the elective branches. Having announced in 1985, in *Garcia v. San Antonio Metropolitan Transit Authority,*[1] that issues of federalism would be left essentially to political

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1. 469 U.S. 528 (1985).

accommodations worked out between the national government and the states, the Court has now reinvolved itself in federalism disputes.[2] Of course, over the past dozen years the Court has decided a number of important separation of powers issues, ranging from the legislative veto to the comptroller general's powers under the Gramm-Rudman Act and the independent counsel.[3]

Yet the problem comes not so much from scholars who encourage the courts to abandon scrutiny of structural issues as from the willingness and the desire of judges to turn their attention elsewhere. As a prescription, we can advise the Supreme Court to "intensify its enforcement of the constitutional provisions dealing with political structure, for the simple reason that the Constitution's text unambiguously dictates the existence of a specific governmental form" (6). That is correct, but courts may, for reasons related to their own institutional needs, decide to give short shrift to many issues involving constitutional structures and limits. What do we do then? Criticize judges for neglecting their duties? Impeach them for failing to carry out their oath of office?

For example, in recent decades there have been many efforts to bring war power issues to the courts for adjudication. Because of standing, ripeness, mootness, political questions, equitable discretion, and so forth, judges simply refuse to reach the merits. Some scholars recommend that any member of Congress should be authorized to bring an action in federal court for declaratory judgment and injunctive relief on the ground that a presidential war action has violated statutory policy. But efforts to compel judges to decide cases are both unwise and unconstitutional. The question of what constitutes a case or controversy must be left to judges. If they decide, for institutional reasons, to duck an issue, no power from other branches can order them to confront what they do not want to confront. For a number of good reasons, including lack of judicial competence, judges may properly conclude that disputes over the war power are best left to the elected branches.[4]

Another constitutional issue that judges decide to sidestep is the Statement and Account Clause. In Article I, Section 9, Clause 7, the framers placed an explicit safeguard for financial accountability: "[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Through these public statements, citizens would know how tax money had been spent.

Nevertheless, ever since 1949 we have been funding through covert means the intelligence community, which consists of the Central Intelligence Agency, the National Security Agency, and other governmental agencies. The amount of money provided to the intelligence community is estimated at about $27 billion annually, and yet none of that money is identified publicly. Instead, it is

2. United States v. Lopez, 115 S. Ct. 1624 (1995); New York v. United States, 505 U.S. 144 (1992); Gregory v. Ashcroft, 501 U.S. 452 (1991).

3. Morrison v. Olson, 487 U.S. 654 (1988); Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983).

4. Louis Fisher, Presidential War Power 197–99 (Lawrence, 1995).

hidden in various appropriations bills for the Department of Defense, the State Department, and other agencies. An effort to take this issue to the Court to compel compliance with the Statement and Account Clause was rebuffed when the Court held that the plaintiff lacked standing to bring the suit.[5]

Similarly, there is a substantial constitutional issue when presidents terminate treaties on their own, without legislative involvement. If treaties are like statutes,[6] and it takes joint action by the president and the Senate to make a treaty, how can treaties be terminated unilaterally by the president? When President Jimmy Carter terminated the mutual defense treaty with Taiwan, Senator Barry Goldwater took the matter to court to determine the constitutional issue. The justices split along so many lines that their opinions shed little light on the president's power to terminate treaties. Justice Powell would have dismissed the complaint as not ripe for judicial review. Justice Rehnquist, joined by Chief Justice Burger and Justices Stewart and Stevens, viewed the matter as a nonjusticiable political question that should never be considered by the courts. Justice Blackmun, joined by Justice White, believed that the Court should have set the case for oral argument and given it plenary consideration. Justice Brennan disagreed that the matter was a political question. Justice Marshall, without writing a separate opinion, concurred in dismissing Goldwater's complaint.[7]

It is too much to argue that a theory of judicial abdication "improperly implies that the Court is free to pick and choose the constitutional provisions it is willing to enforce. Nothing in the proper nature of the judiciary's role authorizes it effectively to repeal provisions in the Constitution" (20). Later in the book Redish issues this warning: "If the judiciary is given authority to choose which provisions to enforce, abandonment of the individual liberty provisions in favor of the structural guarantees is just as conceivable a judicial option as the reverse. Neither alternative, however, should be available to the judiciary" (164).

When the Court fails to act, it does not repeal provisions in the Constitution. It simply leaves their enforcement to the elected branches or to the legal dynamics of another day. It is not a question of the Court's "abandoning" certain provisions in the Constitution. It is usually a question of timing, prudence, or the form in which a dispute reaches the Court. Redish's position sounds a little too much like Chief Justice Marshall's admonition: "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should."[8] The fact is that no Court, including the one presided over by Marshall, has followed that theory.

5. United States v. Richardson, 418 U.S. 166 (1974). A similar citizen's challenge under the Freedom of Information Act failed on standing and political-question grounds. Halperin v. CIA, 629 F.2d 144 (D.C. Cir. 1980).

6. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." U.S. Const. art. VI, cl. 2.

7. Goldwater v. Carter, 444 U.S. 996 (1979).

8. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

Redish believes that the courts have special strengths and qualities that allow them to decide matters of constitutional structure. Because of "formal insulation from majoritarian political pressures, the judiciary was the best suited of the three branches to interpret the countermajoritarian Constitution and to protect its principles." The judiciary could fulfill this function "by remaining free from majoritarian pressures" and by becoming a "countermajoritarian body" (8).

Whatever merit these points have in theory, the history of the Court seems to run in the other direction. After Chief Justice Marshall established judicial review in *Marbury v. Madison*,[9] the Court's political role was to uphold congressional statutes involving the application of national power. It did not become a countermajoritarian body. Instead, it legitimated what Congress had done. When the judiciary later decided to become countermajoritarian by using substantive due process to strike down federal and state statutes that attempted to ameliorate economic conditions, Congress, the president, and the country rebelled. The Court knows that it has a countermajoritarian role, but if it plays that card too frequently, and with political insensitivity, it will pay a price. The posture of being consistently countermajoritarian in a democratic society is not sustainable.

Redish further notes: "If the majoritarian branches could sit in final judgment on the constitutionality of their own actions, there would, as a practical matter, be little point in having imposed formalized countermajoritarian constitutional limitations in the first place" (8). One could just as well say: "If the countermajoritarian branch (the judiciary) sits in final judgment on constitutional questions, there would, as a practical matter, be little point in having elected branches and a representative democracy." Who checks the judiciary? What is there in two centuries of judicial review to merit such confidence in the judgment of the courts?

How much activism we should want from the judiciary has been debated ever since 1789, with no resolution to date and no resolution expected for the future. We want the courts to monitor the political branches and act as a check, but we want, also, judicial self-restraint. Through painful missteps, the courts have learned the dangers of overextending themselves. In a famous article, Alexander M. Bickel concluded that judicial methods of avoiding a decision on the merits were essential attributes of an unelected judiciary in a democratic society, particularly "a large and heterogeneous" society like the United States. The American political system would "explode" unless it exercised the "arts of compromise" and discovered ways "to muddle through." Bickel summed up his political theory neatly: "No good society can be unprincipled; and no viable society can be principle-ridden."[10]

The final chapter of the book is devoted to the problem of Congress's delegating its power to other branches. The post–New Deal Supreme Court, as

9. 5 U.S. (1 Cranch) 137 (1803).

10. The Supreme Court, 1960 Term—Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 49 (1961).

Redish points out, "substantially relax[ed] the constitutional limits on legislative delegation." "Purely as a matter of constitutional theory, it is difficult to understand the Court's abandonment of the limits on delegation." By constitutional theory, Redish means the text of Article I, Section 1, which vests the legislative power in Congress. "No other branch of government is given power to 'legislate'" (135). Redish concedes that definitional questions will arise as to whether an action should be characterized purely as "legislative power" or whether it is executive action under statutory power. Still, he says "there can be little doubt that judicial abandonment of the nondelegation doctrine has authorized breaches of the definitional limitations" (136).

Interest in the delegation issue can come from two directions. Redish is concerned about the Court's abandonment of the limits on delegation. One could be equally concerned about the Court's decisions, in 1935, to strike down a delegation of congressional power to the president.[11] That is the only time a delegation to the president has been invalidated. What is of most interest? The "abandonment" of judicial scrutiny after 1935 or the Court's injection of the nondelegation doctrine that year? For all the criticism of legislative delegation to the executive branch, no one has offered a credible and practical theory that would guide the Court on this question, and it is unlikely that anyone will.

11. A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

Daniel Hays Lowenstein, *Election Law: Cases and Materials.* Durham: Carolina Academic Press, 1995. Pp. xxi + 821.

Reviewed by Richard L. Hasen

The AALS Directory of Law Teachers does not yet list teachers of Election Law as it currently lists teachers of established courses such as Torts or Law and Economics. Indeed, a perusal of the directory's biographies of scholars writing in the election law field reveals that they teach such courses as Law and Political Participation, Law of the American Political Process, and Speech and Money. Daniel Hays Lowenstein's masterful new casebook promises to establish a canon of election law materials and to set the stage for inclusion of election law as a course that every serious law school will want to include in its offerings.

It is a course eminently worthy of study by law teachers and law students alike. Although few students studying the material will practice election law, the majority who do not will benefit from studying some of the most important questions about the way the law shapes political participation in the United States. To take just two recent examples, election law concerns itself with the proper role race should play in drawing lines for legislative districts and the level of judicial protection to be afforded to those on the wrong end of a ballot measure, such as undocumented aliens in California and gays in Oregon and Colorado.

But Lowenstein does more than present the intricate constitutional and statutory questions that arise in areas ranging from the right to vote to political patronage to campaign finance. Instead, he connects three separate worlds: the rarefied world of judges who decide election law cases; the (perhaps more rarefied) world of scholars who study the role of law and legal institutions in the political process; and the rough-and-tumble real world of America's politicians. The casebook demonstrates that judicial views of "good politics" drive most election law cases. For this reason alone, election law is worthy of study as a subject in its own right; the topic deserves more attention than instructors can afford to pay to it in other courses like Constitutional Law.

Scope and Coverage

Lowenstein's advantage in compiling an election law casebook is apparent when one considers the breadth of his scholarship[1] as well as his practical

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1. See, e.g., Associational Rights of Major Political Parties: A Skeptical Inquiry, 71 Tex. L. Rev. 1741 (1993); *Bandemer's* Gap: Gerrymandering and Equal Protection, *in* Political Gerryman-

experience as former chairman of the California Fair Political Practices Commission. Lowenstein draws upon his own work and life experience, often with self-deprecating wit,[2] to entice the reader to consider the real-world consequences of legal doctrine on political power relationships in this country.

I used the new casebook for the first time in fall 1995, and I believe Lowenstein sensibly edits cases and scholarly works, complementing them with provocative note material; if anything, he errs on the side of overinclusiveness in his 821 pages. The teacher's manual is particularly good at discussing possible answers to questions posed in the note material, and at suggesting various pedagogical exercises to stimulate student thought. Though the casebook lacks a subject index, it contains a comprehensive table of cases and table of authorities.

The book's sixteen chapters cover four general subject areas: voting and representation, ballot propositions, political parties, and campaign finance. Before Lowenstein gets into these subject areas, he uses Chapter 1 to present classic writings on representative government, and to set up progressivism and pluralism as two rival political theories that do battle throughout the casebook. The concept of representation forms the basis for answering core questions appearing later in the casebook. By returning to the themes in Chapter 1 throughout the book, Lowenstein should convince the skeptical reader that political theory is alive and well (albeit barely acknowledged) in judicial opinions considering election law issues.

Chapters 2 through 5 consider voting and representation. The analysis begins with the right to vote itself, presenting a brief history of suffrage and enfranchisement in the United States. It also contains a discussion of the controversy over the reasons for declining American voter turnout and whether the recently enacted motor voter law will reverse the trend. Chapter 2 also debates the constitutionality and desirability of giving legal aliens the right to vote. This topic stimulates a lively and useful debate among the students early in the semester on the nature and value of the vote.

Chapter 3 then delves into the Supreme Court's jurisprudence on voting qualifications, and the right to an equally weighted vote. Perhaps surprisingly, Lowenstein begins not with the seminal case of *Reynolds v. Sims*,[3] which prohibited on equal protection grounds unequally populated state legislative districts, but rather with the later case of *Kramer v. Union Free School District No. 15*.[4] The decision to begin with *Kramer* is pedagogically sound because *Kramer* presents a nice segue from the material in Chapter 2. *Kramer* estab-

dering and the Courts, ed. Bernard Grofman, 64 (New York, 1990); On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted, 18 Hofstra L. Rev. 301 (1989); Political Bribery and the Intermediate Theory of Politics, 32 UCLA L. Rev. 784 (1985) [hereinafter Political Bribery].

2. For example: "Masochists and insomniacs will welcome the news that the debate over whether campaign contributions can be corrupt is resumed in essays by Cain, Strauss, and Lowenstein . . . " (506).

3. 377 U.S. 533 (1964).

4. 395 U.S. 621 (1969).

lishes that, unlike aliens, who regularly are excluded from voting, resident citizen adults otherwise qualified to vote may not be excluded from local elections. The notes following *Kramer* probe whether voting should be limited to resident citizen adults, and, perhaps more important as a stimulant to critical thinking, the notes consider the judicial sleight-of-hand used by the *Kramer* court to reach the result it wanted without overruling precedent upholding fairly administered literacy tests (pages 69–71).

Chapters 4 and 5 move on to one of the thorniest issues the Supreme Court has faced in recent years, legislative districting. Following a brief look at the question of precisely how equal the population of legislative districts must be (101–02), Chapter 4 analyzes the criteria used to draw legislative districts. Lowenstein does a good job setting up the dichotomy between "formal" criteria for districting, such as compactness and contiguousness, and "result-oriented" criteria, which "take into account the expected political consequences of the districts" (115), and he forcefully argues that gerrymandering is an inherently political act, even when only "formal" criteria are used. The remainder of Chapter 4 focuses on *Davis v. Bandemer*,[5] in which the Supreme Court considered the justiciability and standard for a gerrymandering case brought by members of a political party.

Chapter 5 presents some of the most interesting material in the casebook, but also some of the most difficult to teach. Focusing on Supreme Court redistricting cases, and especially cases decided following the 1982 amendments to the Voting Rights Act, Lowenstein explains the requirements for, and limits upon, race-based legislative districting. The chapter pays particular attention to the squeeze put upon legislators and courts trying to draw districts consistent both with the VRA and the Constitution following *Shaw v. Reno*[6] and *Miller v. Johnson*.[7]

The chapter is difficult to teach because there is both too much and too little material on the VRA. For example, Chapter 5 contains a detailed discussion of the relationship between sections 2 and 5 of the amended VRA (183–85). But the discussion immediately follows *Thornburg v. Gingles*,[8] which Lowenstein, in the teacher's manual (47), rightly terms a "monster" case requiring a close reading by the students. With a focus on *Gingles*, most of the students will gloss over the detailed VRA discussion that follows in the notes. To do justice to the discussion and others like it would require spending days on the notes in addition to the principal cases (and that would only scratch the surface of VRA jurisprudence unrelated to the districting question). On the other hand, ignoring the complex VRA questions makes any understanding of the recent Supreme Court cases incomplete. Perhaps Lowenstein has done the best job possible for someone who wants to do more with an election law casebook than consider only the role of race in legislative districting.

5. 478 U.S. 109 (1986).
6. 113 S. Ct. 2816 (1993).
7. 115 S. Ct. 2475 (1995).
8. 478 U.S. 30 (1986).

Lowenstein devotes Chapter 6 to issues related to ballot propositions. Chapter 6 easily could have appeared right after Chapter 1, because the desirability of "direct democracy" measures such as the initiative, the referendum, and the recall pose a direct challenge to Madison's arguments for representative democracy as a cure for the dangers of faction. The chapter considers the desirability of ballot measures and traces the progressivist push for increased use of direct democracy devices. Chapter 6 concludes with a look at various laws limiting the scope and breadth of ballot measures, and with the question of when and how courts should review the constitutionality of ballot measures.

Chapters 7 and 8 focus on legal issues related to political parties. Chapter 7 begins with a detailed examination of the responsible party government normative position, that strong political parties are required for accountability and the coherence of government programs. Although Lowenstein conceives of responsible party government as closely related to pluralist theory (18), the two present alternative normative positions,[9] and Lowenstein could have included the responsible party government normative position more prominently among the political theories described in Chapter 1.

The remainder of Chapter 7 concerns legal issues involving the two major political parties. After a discussion of the White Primary Cases, in which the Supreme Court had to circumvent the state action doctrine to prevent the Texas Democratic Party from excluding African-Americans in choosing its candidates, Lowenstein runs through a series of cases testing the extent to which legislatures may regulate the internal affairs of political parties. This is the only place in the casebook where Lowenstein allows his own fascination with a topic to prevent more sensible editing; the issues involved are simply too tangential and too lacking in practical significance to justify forty-three pages (and five principal cases). Chapter 7 ends with a good discussion of the constitutional limits placed on the practice of political patronage.

Chapter 8 examines the law related to third parties and independent candidates. The chapter makes the important point that although ballot access laws, the lack of equal (or any) public financing in presidential elections, and unequal access to televised debates may to some extent hamper the efforts of minor candidates, it is the winner-take-all single-district electoral system that best explains the failure of third parties to break the two-party monopoly. Justice White's majority opinion and Justice Marshall's dissenting opinion in *Munro v. Socialist Workers Party*[10] follow, and they nicely set forth contrasting views of the role of third parties in American democracy.

9. Pluralist theory is both a positive and a normative theory. Positively, it argues that the political process is best understood as a struggle among groups. Normatively, it argues that the outcome of group struggle is generally satisfactory. See p. 18; but see Richard L. Hasen, Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers, 84 Cal. L. Rev. 1, 6 (1996) (arguing for an "egalitarian pluralism," with a normative goal of assuring groups roughly equal political capital). Responsible party government is a normative theory about the proper role for legislators given the positive insights of pluralist theory. Responsible party government *rejects* the normative pluralist view that the outcome of group struggle is generally satisfactory. See, e.g., Morris P. Fiorina, The Decline of Collective Responsibility in American Politics, Daedalus, Summer 1980, at 25 (*reprinted at* 300–15).

10. 479 U.S. 189 (1986).

The final major topic, campaign finance, consumes nearly half the book's pages. Chapter 9 begins with a study of political bribery, and focuses on the question whether and how a campaign contribution may be considered "corrupt." The chapter closely tracks Lowenstein's argument in his 1985 bribery article[11] that most campaign contribution bribery cases turn on whether the defendant had a "corrupt" intent, and that defining corruption requires some "intermediate theory of politics" regarding the proper extent of influence over legislators.

Having whetted our appetites by demonstrating the elusiveness of the distinction between legitimate campaign contributions and political bribery, Lowenstein turns in Chapter 10 to some hard facts about the role of money in American politics and to competing perspectives on whether campaign contributions can be corrupt. A teacher pressed for time can easily skip this latter material; the issues presented there come up time and again in the chapters that follow.

Chapter 11 is devoted almost exclusively to that portion of *Buckley v. Valeo*[12] discussing contribution and expenditure limits. Although the notes following the case are good, perhaps of greatest use are the notes Lowenstein inserts through editor's footnotes *within* the opinion itself. For example, the reader gets to consider Judge J. Skelly Wright's criticism of *Buckley*'s speech/conduct analysis at precisely the point the Court makes the argument.[13]

The next three chapters explore Supreme Court campaign finance jurisprudence since *Buckley*. Through the three chapters, we watch the pendulum swing from the anti-reform *Bellotti*[14] and *Citizens Against Rent Control v. City of Berkeley*[15] to the pro-reform *Massachusetts Citizens for Life*[16] and *Austin*,[17] in which the Court appeared to accept for the first time an equalization rationale for campaign finance reform.

Before approaching public financing and other proposals for campaign finance reform in Chapter 16, Lowenstein takes a detour in Chapter 15 to explore the question of incumbency. Unfortunately, much of this chapter seems out of place. Only its last few pages are devoted to the question whether campaign finance schemes affect the outcome of election races. The bulk of the chapter explores other issues related to incumbency, especially the debate over the desirability of term limits. The material is valuable and insightful; it just should not be sandwiched between major chapters on campaign finance reform. Perhaps if Lowenstein later separates this material into another chapter (maybe by relocating it near other representation issues in Chapter 1), he

11. Lowenstein, Political Bribery, *supra* note 1.

12. 424 U.S. 1, 12–59 (1976).

13. P. 511, n.f (discussing J. Skelly Wright, Politics and the Constitution: Is Money Speech? 85 Yale L.J. 1001, 1007–08 (1976)).

14. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

15. 454 U.S. 290 (1981).

16. Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986).

17. Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990).

will include excerpts from *U.S. Term Limits, Inc. v. Thornton*,[18] the major Supreme Court case from last term declaring unconstitutional state-imposed term limits on members of Congress. *Thornton* gets barely a mention in Chapter 15 (716).

Lowenstein's final chapter explores the role money plays in post-*Buckley* American politics, with special attention to "soft money" and PAC contributions. He ends with a discussion of the desirability of various public financing proposals and a look at some novel constitutional questions arising from states' experimentation with campaign finance reform in the last few years.

The Virtue of Selfishness and the Virtue of Virtue

Lowenstein has done a tremendous service by compiling a user-friendly, thoughtful, and relatively comprehensive guide to election law in the United States. His work could be strengthened even further by expanding the political theories covered in the casebook to include more prominently both civic republicanism and public choice theory.

Modern civic republicanism traces its roots to James Madison.[19] Civic republicans recognize that, as a positive matter, "elements of pluralism provide a central feature of modern politics."[20] But as a normative matter, civic republicans reject the pluralist bazaar of competing interest groups.[21] Civic republicans place a great emphasis on civic virtue. Suzanna Sherry writes: "[I]n the republican vision, a primary function of government is to order values and define virtue, and thereby educate its citizenry to be virtuous."[22] In Steven G. Gey's words: "Virtue, the republicans argue, is defined by the political process of dialogue and ultimate agreement over fundamental collective goals and aspirations."[23] With a focus on deliberation, civic republicanism is analytically distinct from both pluralism and progressivism.

Public choice theorists present both a positive and a normative view of the political process. Positive public choice theory applies economists' assumption of rational self-interested behavior to political science issues.[24] Although its roots are in classic pluralism, the theory lacks pluralism's rosy, democracy-affirming vision of a relatively benign political marketplace. Instead, interest groups use their political capital to secure goods from the state, a process termed "rent seeking,"[25] leading to a decline in overall social wealth. Using efficiency as a yardstick, normative public choice theory calls for limits on

18. 115 S. Ct. 1842 (1995).

19. Cass Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 30 (1985).

20. Cass Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1547 (1988).

21. Sunstein, *supra* note 19, at 31.

22. Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 Va. L. Rev. 543, 552 (1986).

23. The Unfortunate Revival of Civic Republicanism, 141 U. Pa. L. Rev. 801, 807 (1993).

24. See Daniel A. Farber & Philip P. Frickey, Law and Public Choice 7 (Chicago, 1991).

25. See Gordon Tullock, Rent Seeking, *in* The New Palgrave: The World of Economics, eds. John Eatwell et al., 604 (New York, 1991).

group political participation. One way to limit groups' participation is to limit the size of the state, because elected officials inevitably create rents for interest groups in pursuit of their own reelection. The fewer rents the state can give away, the greater the social wealth.[26]

Lowenstein cites only a few of the fine scholarly articles exploring election law issues from the civic republican and public choice perspectives. He justifies his focus on progressivism and pluralism on the ground that "these theories, far more than the currently fashionable academic theories, have been the prevailing paradigms for most of the participants in the controversies in which this book is concerned" (19).

Although progressivism and pluralism have been the prevailing paradigms, and for this reason I certainly do not advocate their removal from the casebook, academics have spilled far more ink the past two decades on civic republicanism and public choice theory. More important, it seems inevitable that so long as judges are pulled from the ranks of academia, new academic perspectives will find their way into judicial opinions. Judge Frank Easterbrook, for example, relied on public choice theory in a recent judicial opinion.[27] Justice Stephen Breyer has argued against public choice theory in his scholarly writings,[28] and one commentator views him as having adopted "a neo-republican outlook in which civic-minded public servants act in the public interest."[29] These theories increasingly will find their way into election law opinions in the years to come.

Civic republicanism makes a brief appearance in the casebook, though not by name, in the debate over who constitutes the "community" entitled to vote in particular elections (39, 99). This is the only textual reference in the casebook to the civic republican writings of Frank Michelman, and the book fails to cite Cass Sunstein's work even once. Public choice theory fares slightly better than civic republicanism. Lowenstein devotes a half page in the first chapter to Olson's "collective action" critique of classic pluralism (18),[30] and he includes a nice discussion of the so-called "paradox of voting," the question why anyone rationally chooses to vote given free-rider problems (43–45). Other public choice arguments get a passing mention (e.g., 98, 388–89, 393 n.b), but there is no sustained public choice theme.

26. See Richard A. Epstein, Property, Speech, and the Politics of Distrust, *in* The Bill of Rights in the Modern State, eds. Geoffrey R. Stone et al., 56 (Chicago, 1992); Jonathan R. Macey, The Missing Element in the Republican Revival, 97 Yale L.J. 1673, 1680 (1988).

27. > Because no single person's vote affects the outcome of a plebiscite, the voters do not invest heavily in information; rational ignorance is the order of the day .... Professional legislators not only have more time to brush up on the facts but also more reason to do so, because votes in a smaller assembly are more likely to be dispositive. Of course ... representatives also have more opportunity to court (and be courted by) special interest groups ....
>
> Marusic Liquors, Inc. v. Daley, 55 F.3d 258, 262 (7th Cir. 1995).

28. See, e.g., Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 866–67 (1992).

29. Eric J. Gouvin, A Square Peg in a Vicious Circle: Stephen Breyer's Optimistic Prescription for the Regulatory Mess, 32 Harv. J. on Legis. 473, 482 (1995).

30. Mancur Olson, The Logic of Collective Action (Cambridge, Mass., 1965).

Both theories could inform debate in all four principal areas of the casebook's coverage.

> *Voting and representation.* What role should race play in legislative districting from a civic republican perspective? Who does public choice theory predict will be the likely winners of districting battles?
>
> *Ballot measures.* Is there a civic republican tension between fostering democratic institutions and the often discriminatory results of ballot races? When will groups engage in rent seeking through ballot measures rather than through the legislature?
>
> *Political parties.* Do strong political parties inhibit reasoned deliberation among representatives? May strong political parties prevent interest groups' rent seeking?
>
> *Campaign finance.* How do civic republicans balance the right to free expression guaranteed in the First Amendment with the correlation between effective political speech and wealth? Under positive public choice theory, is meaningful campaign finance reform possible?

It may be that civic republicans and public choice theorists have not thought about all of these issues, and a casebook is not the place to tackle them for the first time. But at least some election law issues *have* been considered and *should* be discussed. For example, both John Rawls and Cass Sunstein have argued from a republican perspective that the laissez faire campaign finance regime set forth in *Buckley* is no more legitimate than the now-discredited laissez faire economic regime the Supreme Court once approved of in *Lochner*.[31] And Jonathan Macey has argued from a normative public choice perspective against campaign finance reform proposals that simply give an advantage to groups that can organize better over groups that raise more money.[32] To the extent Lowenstein can identify civic republican and public choice arguments on election law topics, he should include them in a revised edition of the casebook. Though this will make the already long book even longer, it will also make the already strong book even stronger.

31. John Rawls, Political Liberalism 362 (New York, 1993); Cass R. Sunstein, Free Speech Now, *in* The Bill of Rights in the Modern State, *supra* note 26, at 291.

32. Macey, *supra* note 26, at 1680 n.38.

Alan Watson, *The Spirit of Roman Law.* Athens: University of Georgia Press. Pp. xix + 241.

Reviewed by Michael H. Hoeflich

The study and teaching of Roman law in the United States has always proceeded by fits and starts. One continuing characteristic, however, has been the importance of foreign-born scholars who either have trained American disciples or have emigrated to the United States. The first teacher of Roman law at Harvard was a German, Charles Follen. Hugh Swinton Legare, the best of the Southern antebellum Romanists, was trained at Edinburgh. Roscoe Pound was Germanized through and through. After the Second World War, Roman law studies (and a good deal else) were re-energized in the U.S. by émigrés like David Daube, Stefan Kuttner, and Ernst Levy. The past dozen years have been another period of re-energization in American Roman law studies, brought about, in large part, by Alan Watson's move from Scotland to the United States, first at the University of Pennsylvania and now at the University of Georgia.

Watson is, without question, one of the greatest living expositors of Roman law in the English-speaking world. One of his colleagues once commented that he was probably the greatest interpreter of Roman law since the medieval jurist Irnerius lectured at Bologna. Watson made his scholarly reputation with a series of technical monographs on Republican Roman law. This series would, for the normal scholar, have been a life's work. For Watson, it was just a beginning. In more than two dozen books Watson has traced the evolution of Roman legal ideas from the Twelve Tables to the modern day. In addition, he put together an international team of translators who produced the first decent English translation of Justinian's *Digest,* the most important source for Roman juristic thought. Now he has assumed the editorship of a new series to be published in honor of the anniversary of Montesquieu's life and work and has himself written the first volume, entitled simply *The Spirit of Roman Law.*

This new volume from Watson is a triumph on several levels. First, and foremost, it is a summation of his thinking about Roman law and the more general topics of law-making and the transmission of legal ideas begun in such works as his *The Making of the Civil Law* and *Failures of the Legal Imagination.* In this volume Watson brings together, in the context of his analysis of the essence of Roman law, his various theories on the structure and function of legal systems, the ways in which laws are borrowed, adopted, and adapted from one system to another, the development of legal categories in legal systems, and the importance of private jurists as opposed to public legislators in the civil law tradition. On a second level the book is a masterpiece of synthesis, as

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well, for in it Watson takes the best of his own and other scholars' research to explain the particular characteristics that have made the Roman legal system vibrant for more than two millennia. In a series of chapters he explores such fundamental concepts as the interaction of private law and religion, the distinction between private and public law, the unique role of Roman jurists in the development of Roman law, and the concept, which Watson himself has developed in a number of books, of the "isolation" of Roman law as a creation of an intellectual elite concerned more with the abstractions of Greek philosophy than the day-to-day policing of the city.

This new volume will delight already addicted Watsonians as well as provide a simple and clear introduction to both Roman law and Watson's theories of Roman law and legal history. It is replete with quotations from Roman texts in clear translation which will introduce a whole new generation, who lack the Latin necessary to read the originals, to Roman legal thinking. But it is not a book designed for beginners alone. On the contrary, it provides both an introduction and an overview but also contains enough sophisticated analysis to please and provoke specialists. Watson's discussions of the role of the jurists in law-making and of the indirect influence of religion and of the Roman pontiffs on legal development at Rome will be sure to evoke comment from experienced Roman lawyers. In this volume Watson has taken the opportunity to restate many of the themes developed in his earlier works and to show the connections between these various themes. In some respects, in fact, this volume may be seen as a summing up of Watson's research and writing of the past several decades. In short, this is a book which has much to offer both to the beginner and to the expert. As such it does well the job of imparting a sense of the "spirit" of Roman law to all readers regardless of their experience or expertise.

It is also useful to say what this book is not. First of all, it is not a substitute for Watson's earlier works. While it does provide a general introduction to Watson's thought, the serious scholar must consult his earlier monographs to see the full detail of the careful scholarship that underlies much of the text here. Second, while this is a book designed to give an overview of the "spirit" of Roman law, it is not a basic introductory text on the model of works by scholars such as Barry Nicholas or R. W. Lee. It would not be a good choice for a traditional course on the substantive rules of classical Roman law. Its scope and its vision are far too broad for so narrow a purpose. On the contrary, this volume of Watson's is a perfect companion for courses on comparative law or for surveys of Western legal thought; indeed, it would fit well into more historically inclined courses on Western jurisprudence.

In conclusion, this is a masterful work by a modern master of Roman law and its tradition in the West. It will stand for years as the best exposition in English of this subject and will prove useful to law teachers in a variety of courses. It is also a fitting introduction to an important new series with future volumes by such notable scholars as R. H. Helmholz and A. W. B. Simpson. Romanists, legal historians, and comparatists owe the University of Georgia Press a debt of thanks. In addition to the excellence of the substance, the book is delightful to hold and to read. Its cover art and typography are first-rate.

Edward J. Imwinkelried, *Evidentiary Distinctions: Understanding the Federal Rules of Evidence.* Charlottesville: Michie Company, 1993. Pp. xxix + 203.

Arthur Best, *Evidence: Examples and Explanations.* Boston: Little, Brown and Company, 1994. Pp. xv + 265.

Reviewed by Calvin William Sharpe

In an era of rigorous inquiry into effective pedagogy and heightened awareness of teaching and learning theory, it is quite appropriate to address the quality of analytical study aids in specific subjects.[1] The primary educational tools for teaching the law of evidence are the casebook and a rules supplement, materials that focus the day-to-day classroom treatment of the rules of evidence. Like other areas of the law, the evidence field abounds with supplementary materials designed to facilitate the understanding of complex legal issues. In addition to treatises, nutshells, and hornbooks, there are outlines, CALI exercises, and other learning aids. Two intriguing recent additions to this body of work are Edward J. Imwinkwelried's *Evidentiary Distinctions: Understanding the Federal Rules of Evidence* and Arthur Best's *Evidence: Examples and Explanations.*

Imwinkelried, a highly regarded evidence teacher and scholar, has written on a wide range of evidence topics.[2] He has also published teaching materials and an article on evidence pedagogy.[3] It is not surprising that he has written a book to bring greater clarity to law students struggling to consolidate evidence materials for the first time. Indeed, Imwinkelried is straightforward in declaring the book's purpose as furnishing an aid in outlining. He says that it is to be read immediately before outlining to enhance the use of evidentiary distinctions in the outline and on the final examination. The book is likely to be quite helpful as a learning aid, if used properly.

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1. See Arturo L. Torres & Karen E. Harwood, Moving Beyond Langdell: An Annotated Bibliography of Current Methods for Law Teaching, Gonzaga L. Rev., at 1 (special ed. 1994); Paul T. Wangerin, Teaching and Learning in Law School: An "Alternative" Bookshelf for Law School Teachers, Gonzaga L. Rev., at 49 (special ed. 1994).

2. See, e.g., The Methods of Attacking Scientific Evidence, 2d ed. (Charlottesville, 1992); Exculpatory Evidence: The Accused's Constitutional Right to Introduce Favorable Evidence (Charlottesville, 1990); Uncharged Misconduct Evidence (Wilmette, 1984); see also An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis, 73 Neb. L. Rev. 511 (1994); The Educational Significance of the Syllogistic Structure of Expert Testimony, 87 Nw. U. L. Rev. 1148 (1993).

3. Materials for the Study of Evidence: Cases and Materials, 2d ed. (Charlottesville, 1986) (with Ronald L. Carlson); Evidence Pedagogy in the Age of Statutes, 41 J. Legal Educ. 227 (1991).

Imwinkelried puts to work the concept of legal distinctions to sharpen the focus of students on the Federal Rules of Evidence. He acknowledges the rules' centrality to evidence courses by organizing *Evidentiary Distinctions* into chapters that track the articles of the Federal Rules, but he concentrates on the most important distinctions in the field, omitting several rules entirely and omitting phrases and subparagraphs in many others. In selecting the appropriate distinctions for discussion, he accurately targets much of the misunderstanding among evidence students.[4]

The book's greatest utility lies in focusing on distinctions that are elliptical in the rules but important to their operation, as well as distinctions that are explicitly set forth in the rules. An example is Imwinkelried's discussion in Chapter 2 of the judicial notice distinctions. Rule 201(a) states that the rule "governs only judicial notice of adjudicative facts" and then sets forth in later subparagraphs the kinds of facts that are noticeable, the judge's discretion, opportunity for a hearing, the timing of notice, and jury instructions. Of these matters, Imwinkelried addresses only noticeable facts, hearing opportunity, and jury instructions. To flesh out the distinctions that are important to an understanding of the judicial notice rule, Imwinkelried discusses four distinctions: (1) judicial notice vs. the formal introduction of evidence, (2) judicial notice of fact vs. judicial notice of law, (3) judicial notice of adjudicative facts vs. judicial notice of legislative facts, and (4) judicial notice of matters of common knowledge vs. judicial notice of verifiable certainties (pages 17–21). Though the Advisory Committee Notes address in detail the distinction between adjudicative and legislative facts, as well as the reasons for not subjecting legislative facts to the indisputability requirement of Rule 201(b), the Notes assume an understanding of distinctions (1), (2), and (4) above. Imwinkelried's discussion fills the void not only by explaining the other distinctions that are important to a contextual understanding of Rule 201 but also by providing examples of each set of distinctions.

Imwinkelried's examples, a major strength of *Evidentiary Distinctions,* are reminiscent of his influential *Evidentiary Foundations,* now in its third edition.[5] Law students and lawyers alike applaud the eminently instructive text on trial technique designed to give students and novice trial attorneys a "working understanding" of evidence rules.[6] In *Evidentiary Distinctions* there are equally

4. Examples are the distinctions between "prejudice in the popular sense and prejudice in the technical sense" (page 40), character and noncharacter uses of specific acts evidence (50–51), balancing tests under Rule 403 and those in 412(c) and 609 (67, 98–99), credibility and substantive evidence (83–85), the uses of character evidence as proof of credibility and the merits (90), the use of cross-examination to impeach any witness and to impeach the character witness (93–94), appropriate subjects of expert testimony (118–19), hearsay and nonhearsay (129–37), and proof of the contents of a writing and proof of other matters under the best evidence rule (189–91).

5. Charlottesville, 1995.

6. In *Evidentiary Foundations* Imwinkelried typically divides his discussions of evidence rules into three sections: (1) The Doctrine, (2) The Elements of the Foundation, and (3) Sample Foundations. This schematic creates a smooth flow from the abstract to the concrete, giving readers both a better understanding of doctrine and a model for applying the rules in a trial setting.

useful examples like the jury instruction given for presumptions as distinguished from permissive inferences (27), character and noncharacter uses of specific acts evidence (50–53), statements of admission and compromise under Rule 408 (59–60), the use of character evidence, religious affiliation, and prior inconsistent statements for impeachment (91–92, 93–94, 99–100, 107–08), varieties of leading questions (102), the bases for expert opinion (122–24), and hearsay and nonhearsay statements (129–37). In virtually every illustration of limited admissibility such as the relevance rules and impeachment and hearsay rules (52, 58, 63, 67, 84, 134), Imwinkelried demonstrates the links between alternative theories of admissibility, the limiting instruction, and closing argument. This is a strategic chain that the well-schooled student of evidence must appreciate.

Imwinkelried's commonsense tone, aided by his deft use of evidence policy to explain distinctions, contributes to understanding. Learning theorists point out that learning is contextual: it is more durable when grounded in a network of other associations.[7] Policy provides that network—the reasons for evidentiary distinctions, which facilitate understanding and memory. The discussion of evidentiary distinctions with the policy reasons removes the mystery of the rules, making them accessible to any student with common sense.

Not stopping with verbal elucidation, *Evidentiary Distinctions* contains figures that summarize the discussion succinctly and graphically, depicting the vertical and horizontal relationships among distinctions.[8] Not surprisingly, more than half of the figures are included in the chapter on relevancy, the foundation of the law of evidence.

The considerable strengths of this work overshadow isolated weaknesses relating to coverage and language. For example, Imwinkelried's judgments about which provisions should be discussed and which omitted are clearly understandable in practically all instances, but his omission of a section on the coconspirator admission is inexplicable. The overall approach seems to lend itself to a discussion of the business partnership admission, not addressed in 801(d)(2)(E), as distinguished from the coconspirator (criminal partnership) admission contained in that section. Moreover, the coconspirator statement as vicarious admission (141) would seem to warrant the same contrast with the authorized admission (801(d)(2)(C)) that Imwinkelried gives the agency admission under 801(d)(2)(D). A similar question might be raised about the omission of the circumstantial authentication illustration at Rule 901(b)(4). Rule 901(b) contains four examples of direct authentication and five examples of circumstantial authentication or identification. For instance, one can directly identify a telephone caller as set forth in 901(b)(5) or

7. See Cathaleen A. Roach, A River Runs Through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy, 36 Ariz. L. Rev. 667, 682–85 (1994); Anthony A. D'Amato, The Decline and Fall of Law Teaching in the Age of Student Consumerism, 37 J. Legal Educ. 461, 461–67 (1987).

8. Regarding the differences in learning styles and the effectiveness of matching styles with instructional models see Charles S. Claxton & Patricia H. Murrell, Learning Styles: Implications for Improving Educational Practices (College Station, 1987).

circumstantially by showing that the caller conveyed information likely to be known only by a particular person. Despite the terms of the provision, students often have some difficulty grasping the illustrative purpose of 901(b) and the open-ended possibilities of authenticating evidence. A focus on the distinction between direct and circumstantial authentication might help to drive home both points.

Although in general Imwinkelried treats his subject in a straightforwardly accessible fashion, he occasionally uses stilted language that might be distracting to students.[9] For example, he repeatedly uses the term "historical merits" to refer to factual findings or ultimate facts. Not until close to the end of the book (191) does he define the term with two examples.[10]

These quibbles pale in comparison to the usefulness of the book. It should be recommended as a student study aid, if used properly. But what is proper use?

Citing Marvin Minsky's work,[11] Anthony D'Amato describes effective legal education as a process that helps students create new problem-solving pathways and overcome mental obstacles to such creativity.[12] Recognizing that this process involves mental struggle, D'Amato decries the spoon-feeding of law students as counterproductive to the goal of legal education. Not surprisingly, his observations have implications not only for the style and substance of classroom instruction but also for teaching materials. D'Amato prefers the older casebooks as more effective in helping students to develop new mental pathways:

> But casebooks have evolved along the lines of becoming easier and easier for the students to read and digest. The old casebooks challenged the student to think, to figure out why the cases were placed in that order, and what the relationships were, if any, among a case and the ones preceding and following it. The new casebooks tell the student these things.[13]

If D'Amato is correct in his view that teaching materials forcing a student to grapple with legal issues are more sound pedagogically, a study aid such as *Evidentiary Distinctions* must be properly used to avoid impeding intellectual development. Imwinkelried says in his Introduction that the book should be used "as an aid in outlining" and recommends that it be read just before the student prepares an Evidence outline. But outlining probably has its greatest

9. This is an anomaly for Imwinkelried, who is a proponent generally of a plain English approach to evidentiary issues. See Imwinkelried, *supra* note 5, at 3.

10. In Figure 4 the author isolates the ultimate facts of consequence "on the historical merits" rather than simply "in the case" (34). Other examples of this quirk are the use of "actus reus" in place of "act" (34), "terminological consequence" rather than more straightforward language (138), and "percipient witness" rather than a "witness who perceived" (144). By contrast Imwinkelried's use of the term "linchpin" fact (108–09) in his discussion of collateral inconsistencies may be unfamiliar to students upon first encounter; but his explanation and example both clarify the term and convert it into a mnemonic facilitating longer-term memory.

11. See The Society of Mind (New York, 1986).

12. D'Amato, *supra* note 7, at 463–64.

13. *Id.* at 485.

educational value as an opportunity for students to synthesize the vast amount of evidence materials that they have analyzed over the semester. It is a challenge that should enhance problem-solving capacity, if it is not unduly facilitated. This view suggests that the best time for reading *Evidentiary Distinctions* is after the outlining. At this juncture the book will provide feedback either reinforcing or correcting students' learning. Alternatively, the book could prove useful to students at a much earlier stage of initially understanding and applying the rules.[14] This latter use would be most beneficial to the student who refers to the book only after strenuous independent efforts to understand the rule.[15]

Arthur Best's *Evidence: Examples and Explanations* engages students at a different level of the learning pyramid. In contrast to the "passive and spoon-fed learning" that may characterize the use of commercial outlines,[16] Best sets out to engage students in an active process of solving problems that arise under the Federal Rules of Evidence. Doing problems helps students advance up the pyramid of learning to application and analysis.[17]

Like Imwinkelried, Best organizes his book around the Federal Rules. Unlike Imwinkelried, Best proceeds conceptually rather than sequentially. He begins with the foundational concept in evidence law—relevance (1–52). He then moves to other issues of admissibility relating to the reliability, form, disclosure, and proof of relevant evidence such as hearsay (53–123), examination and impeachment (125–56), expert testimony (157–67), privileges (169–87), authentication and the original writing rule (189–200), presumptions (201–07), and judicial notice (209–12). An appendix contains the text of the Federal Rules with explanations of most provisions and citations to pages of the book containing related examples and explanations (213–60).

A major strength of Best's book is that the problems and explanations are written in plain English, enabling students to achieve comprehension of the rules and their application without the distraction of jargon. Often in the evidentiary appendix Best offers a simplified restatement of the rule (219) or examples of situations falling into categories created by the rule (217).

Most important, the book gives students the opportunity to hit the tennis ball many times.[18] A section typically begins with a statement of the rule

14. See 1 Taxonomy of Educational Objectives: The Classification of Educational Goals (Cognitive Domain), eds. Benjamin S. Bloom et al. (New York, 1956); 1 Michael S. Josephson, Learning and Evaluation in Law School 53–101 (Washington, 1984).

15. See D'Amato, *supra* note 8, at 461–67; see also Daniel Pink, Law School Lite, Wash. Monthly, Nov. 1989, at 20 (noting the irony of negating a $20,000-per-year legal education by "regular use and dependence" upon a $12 commercial summary and recognizing that such outlines may be useful for hard-working and conscientious students in some situations).

16. See Pink, *supra* note 15, at 22 (quoting Dean Colin Diver of the University of Pennsylvania Law School).

17. See 1 Taxonomy of Educational Objectives, *supra* note 14; see also Myron Moskovitz, Beyond the Case Method: It's Time to Teach with Problems, 42 J. Legal Educ. 241, 247 (1992) (on problem-based learning in higher education).

18. This apt description of learning by the problem method is contained in Roach, *supra* note 7, at 690 (discussing Moskovitz, *supra* note 17, at 259, on testing law students).

followed by a discussion of the rationale and limitations of the rule and the way it operates. This block-indented discussion is usually followed by more detailed discussion of the rationale for the rule and of its troublesome aspects, a discussion often illuminated by charts and diagrams. Examples are the chart comparing the admissibility of settlements, payments, or pleas and related statements under Rules 408, 409, and 410 (24), the chart showing alternative inferences to be drawn from the use of character evidence (31-33), the chart describing the public records exception to the hearsay rule (104), and the diagram showing hearsay analysis (63).

Best's hearsay discussion is typical. First, he introduces the discussion in a way designed to remove the rule's intimidating aspects; he says, "The myth of hearsay is that no one understands it" (53). He follows this successful effort with a quotation of the basic rules—801 and 802—and four straightforward paragraphs explaining the basic operation of the rule (53–55). He then uses a clear example to explain the rationale of the rule (55–57). A similar discussion of nonhearsay statements is followed by sections on visual aids to understanding the distinction between hearsay and nonhearsay statements, the subtleties of analyzing statements, and recurring fact patterns that he calls classic hearsay puzzles (66–71).[19]

The introductory discussion, whose length depends upon the complexity of the rule, is followed by a number of problems and corresponding explanations. Typically the examples involve a party's attempt to introduce a single item of evidence at trial under an articulated theory of admissibility. The explanation usually begins with a ruling on the admissibility issue and a discussion of the reason for the ruling that reinforces the introductory exposition of the rule and its rationale.

Paradoxically, if the book has a weakness, that weakness may inhere in its very strength. It is not clear that so much repetition of basic concepts is necessary for the average law student. Concepts are first explained in a general introduction, followed by a more detailed treatment of specific elements of the general themes. Yet another iteration ensues (after problem-solving) in the explanations section, and a final tap occurs in the appendix. Some impatient students may view this amount of repetition as excessive. But the book will never be faulted for underreinforcing evidentiary principles.[20]

Students will make best use of this book if they resist the temptation to read the explanations before independently tackling the examples. If they work through the problems, repeatedly referring, if necessary, to the introductory discussion before reading the explanations, their knowledge, comprehension, application, and analytical skills are certain to improve. The benefits of such

19. Because Best discusses the entire area of examination and impeachment of witnesses in Chapter 5 before turning to examples and explanations, that section contains the highest number of problems—21—and explanations. By contrast, the hearsay chapter is divided into three sections with a total of 34 (7–17–10) examples and explanations.

20. See Roach, *supra* note 7, at 670–79, regarding the learning problems associated with student isolation in law school.

an active approach to helping students learn seem particularly appropriate in this area, where the trial setting may require the quick recognition and resolution of evidentiary issues.